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No. 84-454

IN THE

Supreme Court of the United States

October Term, 1984

L. E. MORRISON and JEAN MORRISON,

Petitioners,

vs.

COUNTY OF SAN DIEGO,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FOURTH APPELLATE DISTRICT, STATE OF CALIFORNIA

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QUESTIONS PRESENTED

1. Is a property owner entitled to a new date of value for his property on retrial when a condemnation judgment is reversed on appeal on grounds not involving the date of value?

2. Is a property owner entitled to a new date of value for his property on retrial when the property owner is the sole cause for several years of delay between trial and retrial in a condemnation action?

3. When the statutory language is "crystal clear" that the date of value established at a condemnation trial will remain the same for subsequent retrials, is a property owner able to circumvent clear statutory provisions by causing numerous continuances of a retrial which results in years of delay between trial and retrial?

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No. 84-454

IN THE

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October Term, 1984

L. E. MORRISON and JEAN MORRISON,

Petitioners,

vs.

COUNTY OF SAN DIEGO,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FOURTH APPELLATE DISTRICT, STATE OF CALIFORNIA

Respondent County of San Diego[1] respectfully opposes issuance of a writ of certiorari to review decisions of the California Supreme Court and California Court of Appeal, Fourth Appellate District, regarding a condemnation case that has already been litigated through every level of the California court system more than once in that over the past eleven years it has been tried twice and appealed twice, resulting in a final decision which is consistent with the United States and California Constitutions and statutory law.

[1] County of San Diego is hereinafter referred to as "County".

OPINIONS BELOW

In addition to the order of the California Supreme Court issued on June 21, 1984 denying a hearing in the California Supreme Court (Appendix A to the Petition); the opinion of the California Court of Appeal, Fourth Appellate District, filed March 29, 1984 (Appendix B to the Petition); the Court of Appeal "Order Modifying Opinion", filed April 17, 1984 (Appendix C to the Petition); and the Judgment in Condemnation of the San Diego Superior Court entered December 16, 1981 (Appendix D to the Petition), petitioners omit inclusion of the other earlier court opinions rendered in this matter prior to the second trial. These opinions include, in chronological order, the original San Diego Superior Court Judgment in Condemnation entered on November 15, 1974 (Appendix 1, *infra*) and the accompanying Finding of Fact and Conclusions of Law also entered on November 15, 1974 (Appendix 2, *infra*); the opinion of the California Court of Appeal, Fourth Appellate District, filed April 18, 1977, reversing judgment and remanding the matter for a second trial (Appendix 3, *infra*); the order of the California Court of Appeal, Fourth Appellate District, filed December 24, 1980, denying petitioners' petition for writ of mandate to stay petitioners' displacement from their property (Appendix 4, *infra*); the order of the California Court of Appeal, Fourth Appellate District, filed July 1, 1981, denying respondent's petition for writ of mandate and/or prohibition challenging the superior court order allowing petitioners to amend their answer to include compensation for loss of goodwill (Appendix 5, *infra*); and the order of the California Court of Appeal, Fourth Appellate District, filed August 10, 1981, denying without prejudice respondent's second petition for writ of mandate and/or prohibition on the same grounds as above (Appendix 6, *infra*). The above additions to the opinions referenced by petitioners constitute a more definite and complete disclosure of the lower courts' opinions and orders in this case as required by Rule 21(k)(ii) of the Rules of the Supreme Court of the United States.

STATEMENT OF THE CASE

L. E. Morrison and Jean Morrison[2] are petitioning this Court to review the final decision by the Court of Appeal for the State of California, Fourth Appellate District, Division One, which was filed in the above entitled case on March 19, 1984 and modified on April 17, 1984. Said decision affirmed in part, reversed in part, and remanded for further proceedings the San Diego County Superior Court eminent domain judgment entered on December 16, 1981. The award for the fair market value (and date of value) was affirmed, the denial of the Morrisons' motion for litigation expenses was affirmed, the award for loss of business goodwill was reversed, and the seven percent interest rate awarded on the condemnation award was reversed and remanded to the Superior Court for further proceedings to determine the applicable market rate of interest.

This case is unique in that it has a lengthy history, the length of which was caused by the Morrisons themselves, who persisted in continuing the retrial in this matter through *eight* consecutive requests for continuances, all of which were granted over the County's opposition.

This action was commenced on February 16, 1973 when the County filed its Complaint in Eminent Domain and the Summons was issued. The Morrisons answered said complaint on July 2, 1973. After depositing a security deposit with the Clerk of the Court, the County obtained an Order for Possession for a portion of the property on August 24, 1973, which took effect on September 13, 1973. On October 29, 1975 the Morrisons obtained a court order authorizing withdrawal of the security deposit held by the court.

The case was first tried in the Superior Court in 1974, the trial of which lasted approximately five months. Judgment was entered

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[2] L. E. Morrison and Jean Morrison are hereinafter referred to as "Morrisons".

on November 15, 1974, the court specifically finding the date of value to be February 16, 1973. Said judgment awarded the Morrisons $837,000.00 for the real property and $61,630.00 for the equipment and fixtures. The County appealed the 1974 decision on the grounds that it was error to admit evidence of net profits derived from a hypothetical business in determining fair market value of the real property. The court of appeal agreed with the County holding that said trial evidence was "clearly prejudicial" and reversed the superior court judgment. The 1973 date of value was not an issue at said 1974 trial or appeal thereof. The remittitur was entered on April 18, 1977.

The retrial of this matter was originally set for July 26, 1978; however, the Morrisons requested numerous continuances, all of which were granted, and changed counsel on three different occasions, all of which resulted in the retrial being delayed three and one-half years. This delay was solely caused by the Morrisons, as is detailed below.

On the first scheduled trial date, July 26, 1978, the Morrisons' first retained counsel, Donald McLean, requested a continuance of the trial date to complete an appraisal to allow the Morrisons an opportunity to propose a settlement. The trial was continued for this purpose; however, subsequent discussions with the Morrisons did not prove fruitful. At the continued trial date of February 22, 1979, the Morrisons again requested a continuance on the grounds that their appraisal was still not complete. The requested continuance was granted to May 9, 1979. At the trial date of May 9, 1979, the Morrisons requested another continuance to October 11, 1979, and represented to the court that they would be ready for trial and would request no more continuances. The continuance was granted.

Just prior to the scheduled trial date of October 11, 1979, the Morrisons discharged counsel Donald McLean and engaged Ronald Endeman as new counsel. Mr. Endeman then requested a fourth continuance of the trial claiming that no appraisal had yet

been done and the matter was continued to March 5, 1980. When the matter was called for trial on March 5, 1980, counsel for the County was engaged in another trial and the matter trailed until April 30, 1980, at which time the Morrisons requested a further continuance, stating that they were not yet ready for trial and that the appraisal had still not yet been completed. The County objected to any further continuances; however, the court granted a continuance to September 22, 1980 and suggested that the County take possession of the property. Mr. Endeman stated that the Morrisons would have no objection to the County taking possession and further represented to the court that he would be ready for trial at the new trial date, September 22, 1980, and would request no further continuances.

A Stipulation and Order Continuing Trial, signed by Mr. Endeman on behalf of the Morrisons and approved by the court, filed on May 20, 1980, reset the trial for September 22, 1980. Said stipulation recites that the continuance was requested by the Morrisons in order to prepare for trial; it was the fifth continuance requested by the Morrisons and the continuance of trial had no effect on the date of value in this proceeding "which is February 16, 1973". The County then deposited the necessary security funds with the court and obtained an Order for Possession on May 9, 1980 for the remainder of the Morrisons' property and took possession of the property on August 13, 1980, at which time the Morrisons' business was relocated to another site. The Morrisons withdrew the funds on deposit with the court on May 16, 1980.

Just prior to the September 22, 1980 trial date, the Morrisons again discharged their second counsel, Mr. Endeman, and engaged present counsel, Louis Goebel. On September 22, 1980, the Morrisons moved for another continuance of the trial and the County objected; however, the court continued the trial until January 19, 1981, on the grounds that there was a new counsel in the case and still no appraisal had yet been completed. On January 19, 1981, the court again continued the trial to March 26, 1981. The County was ready for trial and objected to the

continuance; however, on the scheduled trial date of January 19, 1981, there were no courts available and Louis Goebel, counsel for the Morrisons, had an out-of-town trial beginning January 26, 1981, and the earliest date the court could schedule a trial continuance was for March 26, 1981. On March 26, 1981, trial was again postponed until September 29, 1981. The County was ready for trial and objected to the continuance. The reason for the continuance was that Louis Goebel was engaged in trial through the month of May, and that the Court did not have any available trial dates after May until September 18, 1981. The presiding judge stated at that time that he would grant no more continuances and the case would be sent out to trial on September 29, 1981. Due to court congestion, the retrial in this matter eventually commenced on October 5, 1981. As a result of the above, the retrial of this matter was continued *eight* times, all at the Morrisons' request.

At the commencement of the retrial, on October 5, 1981, prior to selection of the jury, the Morrisons raised the issue regarding the applicable date of value before the trial judge. The Morrisons urged that the May 9, 1980 date of value be used rather than the previously established date of February 16, 1973. The Morrisons did not raise any federal constitutional issue before the trial judge on this matter but, instead, relied upon the substance of a recently enacted state statute which, however, expressly stated, "This title does not apply to an eminent domain proceeding commenced prior to January 1, 1976. . . ." The present eminent domain case was commenced on February 16, 1973 and the trial judge held that "this statutory language is crystal clear," and upheld the February 16, 1973 date of value.

A stipulation setting the value of fixtures and equipment at the sum of $69,505.00 had been previously filed on May 19, 1981, and the jury awarded $875,000.00 as the fair market value of the real property and $56,250.00 as compensable loss of goodwill. The Judgment in Condemnation setting forth the above award together with seven percent interest was entered on December 16, 1981. No objections to the judgment were filed by the Morrisons.

The County filed a notice of appeal as to the loss of goodwill award on February 11, 1982, and the Morrisons filed a notice of cross-appeal on March 5, 1982 as to the judgment in condemnation and the court's order denying recovery of litigation expenses.

The court of appeal favored the County's appeal and reversed the trial court judgment, striking the loss of goodwill award. The court of appeal disfavored the Morrisons' cross-appeal in affirming the trial court's date of value of 1973 and affirming the denial of the Morrisons' motion for litigation expenses; however, the court of appeal did reverse the seven percent prejudgment interest award and remanded the matter back to the trial court to determine the market rate of interest. The Morrisons' Petition for Hearing filed with the California Supreme Court was denied on June 21, 1984. On September 19, 1984 the Morrisons filed the subject Petition for Writ of Certiorari.

ARGUMENT

I.

PETITIONERS' RELIANCE ON *KIRBY FOREST INDUSTRIES v. UNITED STATES* IS MISPLACED

The Morrisons place heavy reliance upon this Court's decision in *Kirby Forest Industries v. United States* (1984) ____ U.S. ____ [81 L.Ed.2d 1] to support their position that they were not awarded "just compensation" when the 1973 date of value established at trial was used for the retrial of the appeal, particularly when several years elapsed between trial and retrial, even though all such delay was solely caused by the Morrisons themselves. However, the *Kirby Forest Industries* case is not applicable in that it is distinguishable from the present case.

Although all eminent domain actions must comply with the provisions of the Fifth Amendment to the United States Constitution

(made applicable to California by the Fourteenth Amendment to the California Constitution) in providing property owners "just compensation" for their land, the federal statutory condemnation scheme is quite different from that of the State of California. As described by this Court in the beginning of its *Kirby Forest Industries* opinion, there are three statutory methods of condemnation available to the United States, whereas there is only one statutory method available to the State of California. Although the federal condemnation procedures and the California statutory procedure all provide "just compensation" to the property owner, each procedure has its own statutory provisions. The so-called "straight-condemnation" procedure, involved in the *Kirby Forest Industries* case, allows the United States to wait until a condemnation award is entered and then the government has the option to purchase the property at the adjudicated price or dismiss the condemnation action. This procedure is quite different from the County's condemnation action in the present case where the County had no option but to pay the adjudicated award no matter what it was, particularly since the County had already displaced the Morrisons and relocated them to a new site.

This Court emphasized the impact of this straight-condemnation procedure on its decision in stating as follows:

> "The Government contends that, in straight-condemnation proceedings like that at issue here, the date of taking must be deemed the date the United States tenders payment to the owner of the land. The Government's position is amply supported by prior decisions by this Court and by indications of Congressional intent derivable from the *structure of the pertinent statutory scheme and the governing procedural rule*." (*Kirby Forest Industries, supra*, ____ U.S. ____ [81 L.Ed.2d 1 at 11], emphasis added.)

This Court goes on further to quote *Danforth v. United States* (1939) 308 U.S. 271 at 284 as follows:

> "[*U*]*nless a taking has occurred previously in actuality or by a statutory provisions* . . . we are of the view that the taking in a condemnation suit under this statute takes place upon the payment of the money award by the condemnor." (Emphasis added.)

As stated above, this Court does show deference to statutory provisions implementing condemnation procedures and, in particular, in establishing a date of taking or value. As will be discussed more fully below, the California statutory scheme expressly established a date of taking in the present action as February 16, 1973.

II.

CALIFORNIA STATUTORY LAW ESTABLISHES THE DATE OF TAKING IN THIS CASE AS FEBRUARY 16, 1973

The date of value in this eminent domain action is February 16, 1973, the date the summons was issued as provided for in former Section 1249 of the California Code of Civil Procedure which was in effect at the time this proceeding was commenced. The superior court, in the original 1974 trial of this matter, specifically found the date of value to be February 16, 1973. This same date of February 16, 1973 was also stipulated to as the date of value for purposes of retrial by the Morrisons and approved by the court. Accordingly, the court below in the 1981 retrial of this matter ruled the date of value to be February 16, 1973 and said date of value was affirmed by the court of appeal. In spite of the prior courts' rulings, the stipulation referred to above, and the

controlling statute, the Morrisons now petition this Court for review of this issue.

The Morrisons argued that the date of value in this matter should have been May 9, 1980, the date the County made a deposit of probable compensation with the court. The Morrisons are apparently ignoring the fact that the County made an earlier deposit of probable compensation in 1973.

In support of a May 9, 1980 date of value, the Morrisons relied on section 1263.110 of the California Code of Civil Procedure, which states in pertinent part as follows:

> "(a) *Unless an earlier date of valuation is applicable under this article*, if the plaintiff deposits the probable compensation in accordance with Article 1 (commencing with Section 1255.010) of Chapter 6 or the amount of the award in accordance with Article 2 (commencing with Section 1268.110) of Chapter 11, the date of valuation is the date on which the deposit is made." (Emphasis added.)

It is important to note that said section begins by stating an exception to this provision, that being if an earlier date of valuation is applicable under this article, then section 1263.110 will not apply. An earlier date of valuation is applicable because the above article did not become operative until July 1, 1976.

The above cited article, referred to as the new Eminent Domain Law, was enacted by the California Legislature in 1975 (Stats. 1975, ch. 1275) and is found in California Code of Civil Procedure Section 1230.010 and following. By the clear terms of the statute, it became operative July 1, 1976, and does not apply to eminent domain proceedings commenced prior to January 1, 1976.

Section 1230.065 of the California Code of Civil Procedure clearly defines the actions to which the new Eminent Domain Law

applies and the actions to which it does not apply. Section 1230.065 is set out below in its entirety:

> "(a) This title becomes operative July 1, 1976.
>
> "(b) *This title does not apply to an eminent domain proceeding commenced prior to January 1, 1976.* Subject to subdivisions (c) and (d), in the case of an eminent domain proceeding which is commenced on or after January 1, 1976, but prior to the operative date, this title upon the operative date applies to the proceeding to the fullest extent practicable with respect to issues to be tried or retried.
>
> * * *
>
> "(d) If, on the operative date, an appeal, motion to modify or vacate the verdict or judgment, or motion for new trial is pending, the law applicable thereto prior to the operative date governs the determination of the appeal or motion." (Emphasis added.)

This action was commenced on February 16, 1973 (Cal. Code Civ. Proc., § 1250.110), almost three years prior to the effective date of the new Eminent Domain Law. Pursuant to subsection (b) of section 1230.065 above, none of the provisions of the new Eminent Domain Law apply to this case.

The applicable law to this case is found in the provisions of the California Code of Civil Procedure in effect when the complaint was filed, former Code of Civil Procedure Section 1237 and following. Pursuant to former Code of Civil Procedure Section 1249, the date of value in the present case is the date of issuance of summons. Former section 1249 provides:

> "For purposes of assessing compensation and damages the right thereto shall be deemed to have accrued at the date of issuance of summons."

Specifically on point with this issue, the California Supreme Court has held that in interpreting California Code of Civil Procedure Section 1249, the date of issuance of summons remains the valuation date in the event of a retrial. (*People v. Murata* (1960) 55 Cal.2d 1.)

The court in *People v. Murata, supra*, 55 Cal.2d 1, at page 10, held:

> "[T]he correct interpretation of [Section 1249] is that the date for fixing valuation and damages is determined at the time of the first trial and in the event of subsequent retrial or trials, *once having become fixed, it remains the same*." (Emphasis added.)

(See also *Santa Maria v. Alco-Pacific Enterprises, Inc.* (1968) 266 Cal.App.2d 477; *People v. Shasta Pipe & Supply Co.* (1968) 264 Cal.App.2d 520; *People v. Mascotti* (1962) 206 Cal.App.2d 722.) The date of value in this matter was determined at the time of the first trial as February 16, 1973, and therefore, "having become fixed", remains the same in the subsequent retrial.

It is of further importance that the parties entered into a stipulation, approved by the superior court on May 20, 1980, that the date of value in the retrial of this proceeding was to be February 16, 1973. The law is quite clear that when parties have stipulated to a particular date of value, that date controls. The use of a stipulation is an expeditious way of resolving valuation date problems. (*State of California v. Clark* (1973) 33 Cal.App.3d 463, 468; *People v. Murata, supra*, 55 Cal.2d 1, 4-5.) Furthermore, the May 20, 1980 stipulation was executed after the effective date of the new Eminent Domain Law and it therefore evidences a clear

agreement as to the February 16, 1973 date of value; and agreement that the Morrisons now seek to breach.

The Morrisons made passing reference to the fact that the originally scheduled retrial in this matter was more than one year after the remittitur was filed; however, California Code of Civil Procedure Section 583(c) allows three years for an action to be brought to retrial after being reversed and remanded:

> ". . . When an action after judgment, an appeal has been taken and judgment reversed with cause remanded for a new trial (or when an appeal has been taken from and order granting a new trial and such order is affirmed on appeal), the action must be dismissed by the trial court, on motion of defendant after due notice to plaintiff, or of its own motion, unless brought to trial within three years from the date upon which the remittitur is filed by the clerk of the trial court. . . ."

The retrial in this matter clearly meets the above statutory limitation, in that the original retrial date was set for 15 months after the remittitur was filed.

It was interesting to find the Morrisons making such an argument as the one above in light of the fact that they are responsible for the retrial in this matter being delayed for three and one-half years through their numerous requests for continuance. Because of the delays incurred between the remittitur and the retrial, the Morrisons now claim they are prejudiced by the previously fixed and agreed-upon date of value. The Morrisons, of course, have the right to reasonable continuances, and even the right to fire their attorneys, one, two or three times, thereby requiring still additional time for new counsel to prepare; however, the Morrisons should not be able to use the delays they alone caused to support an argument for an increased award due to passage of time. Although the County continually and vigorously objected to the

seemingly never-ending continuances requested by the Morrisons, through various tactics, including discharge of several counsel on the eve of trial, the Morrisons succeeded in obtaining continuances of the retrial on eight different occasions. Surely, it would be unjust enrichment to the Morrisons to allow them to reap unconscionable benefits from their procrastinations and dilitory tactics by allowing a date of value subsequent to the original date of February 16, 1973.

The Morrisons cite the case of *Citizen's Utility Co. v. Superior Court* (1963) 59 Cal.2d 805, in an attempt to encourage the Court to depart from establishing statutory and case law in this area. However, this case is easily distinguishable in that the Court in the *Citizen's Utility Co.* case did not circumvent existing law, but instead, created law where none previously existed:

> "*Inasmuch as the Legislature has failed to provide a procedure to cover the contingency involved*, pursuant to its inherent powers the court had the power to devise a proper procedure." (*Citizen's Utility Co. v. Superior Court, supra*, 59 Cal.2d at 812, emphasis added.)

In the present case, there exists no contingency for which the Legislature has failed to provide, and as a result the prevailing legal precedent mandates the date of value to be February 16, 1973.

Superior Court Judge Focht, whose ruling the Morrisons challenge, was completely unpersuaded by the Morrisons' argument for a May 9, 1980 date of value:

> "*On the other hand, it just appears to me that this statutory language is crystal clear*. The Legislature can, of course, make statutes retroactive and sometimes when there is no reference one way or the other as to whether it will be retroactive, it is a

matter of judicial interpretation whether or not it is retroactive.

"The subsection before 1230.065 very clearly states that the law does not apply to an eminent domain proceeding commenced prior to January 1, 1976, which brings us right back to a Murata situation."

Any inequities which might exist were brought about by the Morrisons' own insistent dilatory behavior in obstructing a timely retrial in this matter. Therefore, the law must prevail and the date of value of February 16, 1973 must be affirmed.

CONCLUSION

The California courts' decisions in this matter are not inconsistent with the Fifth Amendment to the United States Constitution nor this Court's decision in *Kirby Forest Industries v. United States, supra*, ____ U.S. ____ [81 L.Ed.2d 1]. This matter was originally tried in 1974 and a 1973 date of taking was established. On appeal, judgment was reversed on the ground that an improper valuation method was relied upon by the jury. This reversal did not affect the date of taking, and a retrial was immediately scheduled. The Morrisons, however, requested one continuance of the retrial after another, all over the County's objections, until *eight* continuances had been granted and several years had elapsed between the trial and retrial. As a result of the delay, caused by the Morrisons alone, the Morrisons now claim they were not awarded just compensation because of the original 1974 date of taking. Had the Morrisons not requested and been granted their numerous continuances for the retrial, this issue would not be before this Court today.

This Court has held in both *Kirby Forest Industries v. United States, supra*, ____ U.S. ____ [81 L.Ed.2d 1] and *Danforth v.*

United States (1939) 308 U.S. 271 that statutory provisions will prevail in determining a date of taking. In the present case, the California statutory provisions are "crystal clear" that once a date of taking is established, it will remain the same in a subsequent retrial or retrials. For all of the foregoing reasons, respondent County of San Diego respectfully requests that the Petition for Writ of Certiorari be denied.

DATED: OCTOBER 18, 1984

Respectfully requested,

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APPENDICES

APPENDIX 1

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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN DIEGO

COUNTY OF SAN DIEGO, Plaintiff, v. L. E. MORRISON, et al., Defendants.	NO. 339813
L. E. MORRISON and JEAN MORRISON, Cross-Complainants, v. COUNTY OF SAN DIEGO, DOES I through XX, Cross-Defendants.	**JUDGMENT IN CONDEMNATION**

Upon the Findings of Fact and Conclusions of Law on file herein and good cause appearing therefor, IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. Upon payment into Court for the benefit of the defendants of the total sum of $898,638, the property described in plaintiff's Complaint as Parcel No. 71-0083 A, B, C, D and E, together with all improvements thereon pertaining to the realty and the fixtures and equipment set forth in the Findings of Fact and Conclusions of Law shall be condemned for the purposes set forth in the Complaint.

2. The payment into Court of the sum of money specified above is in full payment for the interests in the land so taken, together with all the improvements thereon pertaining to the realty, the fixtures and equipment set forth in the Findings of Fact and Conclusions of Law, and for all damages of every kind and nature suffered by the defendant by reason of the taking of the property.

3. From said total sum of $898,638, the following shall be disbursed to the County Tax Collector of San Diego County, pursuant to Section 4986, et seq. of the California Revenue & Taxation Code:

(1) Zero dollars, the total due as of the day before trial, April 16, 1974;

(2) Zero dollars per day from April 17, 1974 (the date of trial) through June 30, 1974;

(3) $17.72 per day from July 1, 1974 to and including the day before the date the Final Order of Condemnation in this proceeding shall be recorded.

4. All taxes, penalties and costs which are a lien on said Parcel and which are apportioned to that portion of the fiscal year from the date that the Final Order of Condemnation is recorded in the

Office of the County Recorder of San Diego County are hereby cancelled pursuant to Section 4986 of the Revenue & Taxation Code.

5. Defendants shall recover costs of suit incurred herein in the sum of $_____.

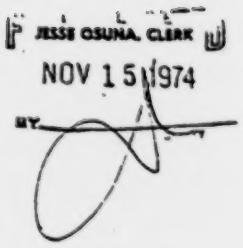
6. The cross-complaint filed by the defendants is dismissed with prejudice subject to the plaintiff's acquisition of the defendants' property by Final Order of Condemnation.

Dated: November 15, 1974

JUDGE OF THE SUPERIOR COURT

GILBERT HARELSON

APPENDIX 2



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Attorneys for Plaintiff and Cross-Defendant

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN DIEGO

COUNTY OF SAN DIEGO, Plaintiff, v. L. E. MORRISON, et al., Defendants.	NO. 339813
L. E. MORRISON and JEAN MORRISON, Cross-Complainants, v. COUNTY OF SAN DIEGO, DOES I through XX, Cross-Defendants.	**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

This action in eminent domain to condemn certain property of the defendant, hereinafter described, for public park purposes, came on for trial on April 17, 1974. The plaintiff is the County of San Diego, a political subdivision of the State of California. The defendants, L. E. and Jean Morrison, are the owners of the real property sought to be condemned by the plaintiff County of San Diego.

The plaintiff County of San Diego appeared by and through Robert G. Berrey, County Counsel, William George, Deputy County Counsel, and Harold E. Landis, Joe N. Turner, J. Tim Konold, and Higgs, Fletcher & Mack.

The defendants, L. E. Morrison, Jean Morrison, Bank of America National Trust & Savings Association, Hattie I. Brewer, a widow, beneficiary under Deed of Trust recorded March 7, 1968 as Document No. 38734 of Official Records and Vesta Gent, a married woman, beneficiary under deeds of trust recorded January 29, 1969 as Document No. 16727 and February 3, 1970 as Document No. 19358, Official Records, County of San Diego, appeared by and through Donald F. McLean, Jr., C. Michael Cowett, and Jennings, Engstrand & Henrikson, a Professional Law Corporation. All of the parties hereto having waived their right to a trial by jury, the case was tried before Hon. Gilbert Harelson, Judge of the Superior Court, sitting without jury.

The trial commenced on April 17, 1974 and concluded on September 10, 1974, and the matter was submitted to the Court for decision. Prior to, during, and following the trial of the action, various legal memoranda were submitted by both parties and considered by the Court.

The parties presented evidence through witnesses, the submission of documents and exhibits, and a view of the condemned property.

Upon consideration of the pleadings on file herein, the evidence, both oral and documentary, submitted herein, the Court's view of the condemned property, the legal memoranda submitted by the parties, the oral argument presented by the parties, and good cause appearing therefor, the Court hereby makes and files the following:

FINDINGS OF FACT

1.

This proceeding in eminent domain was regularly commenced in San Diego County, California, on March 12, 1973 by the filing of a complaint in eminent domain by the plaintiff, the County of San Diego, a political subdivision of the State of California.

2.

The defendants, L. E. and Jean Morrison, are the owners of the property being condemned in this proceeding, as the same is more fully described in the complaint on file herein.

3.

All of the defendants mentioned in the preceding recitals have interests in the property which is the subject of this proceeding and which property is described in the complaint on file herein and is denominated therein as Parcel No. 71-0083 A, B, C, D and E.

4.

Said Parcel No. 71-0083 A, B, C, D and E is an entire parcel and there is no remainder parcel.

5.

The Superior Court of the State of California in and for the County of San Diego is a proper Court for the trial of this proceeding, and the Court has jurisdiction of the parties and of the subject matter of this action.

6.

The property owned by the defendants is being condemned for public park purposes.

7.

The plaintiff, County of San Diego, has the power to condemn all of the defendants' property.

8.

The use and purpose for which the plaintiff County of San Diego is condemning the defendants' property, to wit: a public park, is a public use and is a use authorized by law. The taking of the defendants' property, as described in the complaint, is necessary for said public use. The location of the proposed public improvement and project, which is the object of the action, is planned and located in a manner which will be most compatible with the greatest public good and the least private injury.

9.

The date upon which just compensation is to be ascertained is February 16, 1973.

10.

The plaintiff is condemning fixtures and equipment compensable in an action in eminent domain as follows:

Plant, sand and gravel processing
Blender
Pumping system
Scale, motor truck
Steel hopper
Centrifugal pump
Portable rock crusher
Steel tank (gasoline)
Steel tank (Diesel oil)
Steel shed
Floating dredge, clam shell
Engine/power plant, gasoline engine
Rubber belts, misc., used; sand plant spare parts
Trailer, 2-wheel office

11.

As of the valuation date for the subject parcel, the defendants possessed a right to extract sand from a six-acre site on the property and further possessed a permit from the County of San Diego to process sand extracted therefrom.

12.

As of the date of valuation, there was not a permit to extract sand from any other area of the subject property, nor was there a permit to process sand taken from any other area of the property. As of the valuation date, there was no application pending for a permit to extract or process sand for an expanded area within the subject property.

13.

The highest and best use of the property is interim sand extraction followed by private recreational use.

14.

There is a reasonable probability that a use permit will be issued by the County of San Diego for the expansion of the area of the existing sand extraction program for a ten-year period.

15.

There is a reasonable probability that a use permit will be issued by the County of San Diego for a private recreation park at the end of the said ten-year period.

16.

The market value of the land is the proper measure of just compensation in this case.

17.

The market value of land containing sand must include, as a factor, the value of the sand in place.

18.

The value of sand in place is fixed by capitalizing the net income from its extraction and sale.

19.

The testimony of Keith W. Brownell as to the residual land value after the extraction of the sand is unconvincing.

20.

The defendant has not met his burden of proof as to the residual land value of $210,000, or any value thereof.

21.

The fair market value of the real property sought to be condemned is $837,000.

22.

The fair market value of the fixtures and equipment enumerated in Finding No. 10, supra, is $69,505.

23.

Pursuant to stipulation of the parties it has been agreed that the following items are to be withdrawn by defendants prior to possession by plaintiff at the indicated values:

Scale, motor truck	$2,995.00
Centrifugal pump	120.00
Portable rock crusher	3,000.00
Steel tank (gasoline)	135.00
Steel tank (Diesel oil)	400.00
Trailer, 2-wheel office	800.00
Steel shed	425.00

Thus, the total of the above-withdrawn items is $7,875, and the just compensation for fixtures and equipment actually taken by plaintiff is $61,630.

24.

The total just compensation to be paid to defendants is the market value of the real property, $837,000, plus the net amount due for equipment and fixtures, $61,630, for a total of $898,630.

25.

Defendants and cross-complainants, L. E. Morrison and Jean Morrison, filed a cross-complaint in this action on July 2, 1973.

26.

There was no evidence presented upon the issues raised in the cross-complaint.

CONCLUSIONS OF LAW

1.

The plaintiff herein has the power to condemn the property of the defendants.

2.

Pursuant to Section 4986, et seq. of the California Revenue and Taxation Code, the Court will order that taxes and penalties due and owing the County of San Diego shall be paid from the award.

3.

Upon the payment of damages awarded in the Final Judgment of Condemnation, the plaintiff will be entitled to a Final Order of Condemnation.

4.

The defendants are entitled to their costs of suit herein.

5.

The total just compensation is $898,630.

6.

The income approach utilized by Dr. Edward J. Neuner in fixing the value of sand in place was proper and not precluded by Evidence Code Section 819.

7.

The defendants are not entitled to any damages by reason of the cross-complaint herein, and the cross-complaint shall be dismissed subject to the plaintiff's acquisition of the defendants' property by a Final Order of Condemnation.

Dated: November 15, 1974

JUDGE OF THE SUPERIOR COURT

GILBERT HARELSON

APPENDIX 3

FILED
FEB 14 1977
CLERK
COUNTY CLERK

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

FILED
Robert D. Zumwalt, Clerk
APR 18 1977
BY

COUNTY OF SAN DIEGO,	
Plaintiff and Appellant,	
v.	
L. E. MORRISON, et al.,	4 Civ. No. 15563
Defendants and Respondents.	(Sup. Ct. No. 339813)

APPEAL from a judgment of the Superior Court of San Diego County. Gilbert Harelson, Judge. Reversed.

The County of San Diego sued L. E. Morrison and Jean Morrison in eminent domain to acquire 69.17 acres of river-bottom land located within the flood plain of Sweetwater River. A special use permit had been issued to allow the processing and removal of sand and gravel from approximately six acres of the property. The permit had been issued a number of years before the establishment of a zoning ordinance controlling such activities and the Morrisons were actively engaged in the commercial extraction of sand at the time of trial.

On February 16, 1973, the agreed date of evaluation, the County filed a complaint in eminent domain to acquire the property for park and recreation facilities. After trial by court it was found the highest and best use of the property was for extracting sand for a period of ten years, followed by recreational use, and it was found to be reasonably probable the County would issue a permit for such use. The fair market value of the property was fixed at $837,000 and the value of fixtures set at $61,630, for a total of $898,630. The County appeals.

The County contends it was error to admit evidence of net profits derived from a hypothetical business (sand extraction plant) in determining the fair market value of the real property. It is alleged error resulted from the testimony of Dr. Edward J. Neuner, the defense expert, who sought to place a market value on the minerals located on the property based on the income generated by a hypothetical business.[1]

Dr. Neuner, whose qualifications as an expert in economics are not in contention, studied the land and its potential uses and reviewed the feasibility study of the sand production capabilities of the property prepared by properly qualified geotechnical and civil engineers and determined the highest and best use was as a source of sand and minerals. He stated he had undertaken a study of production, marketing and pricing of construction quality sand in San Diego County and based his conclusions on this work. He theorized the property could be expected to yield 298,600 tons of sand annually for ten years. He testified he viewed the land and minerals as inseparable items of value but found the real value in the sand available for extraction and made no effort to fix a value on the surface area after removal of the minerals. In assessing the value of the material in place he drew the following conclusions:

FOOTNOTE 1: It is not suggested the business conducted by Morrison on the six acres provides the basis for projecting production, sales or expenses of the conduct of business on the acreage subject of this proceeding, so we are not presented the issue of income of an existing business.

1. **Production.** The property could reasonably be expected to produce approximately 300,000 tons a year for ten years, and a special use permit from the County could be obtained.

2. **Income.** The prudent price for sand from the Morrison property would vary from $1.80 to $2.80 per ton depending on its quality and would have a weighted average price of $2.40 per ton of material commercially marketed. He determined the production from this pit would have no significant impact on the price structure of sand in San Diego County which uses more than 4-1/4 million tons annually and it could be assumed all the sand could be marketed. On this basis the property would produce an annual sales revenue of $716,640.

3. **Expense.** The direct production costs of extracting, processing and marketing the material would approximate $1.10 per ton extracted ($1.10 times 312,400 tons for a total of $343,640 annual operating costs); $50,000 would be a reasonable allowance for administrative overhead and cost of managing the extraction; property taxes would run $17,774 annually.

4. **Capital investment.** $585,000 was a prudent estimate of the capital expenditures required for a sand producing capacity of 300,000 tons per year. An allowance should be made for a 17 percent capitalization rate of return for the investment in a business with characteristics and risks as here involved.

After determining the value of the minerals the property might reasonably be expected to produce each year, he deducted the cost of extraction including administrative costs, discounted the income at 17 percent for the ten-year period and subtracted the cost of the capital investment to arrive at the present value of the minerals, namely, $836,926.

The trial court obviously placed great reliance on this method of valuing the property as evidenced by Finding of Fact No. 18.[2] The finding the property has a fair market value of $837,000 corresponds to the testimony of Neuner, rounding off his figure to the closest $100. The finding the residual value of land, subject of the testimony of defendants only other expert, was unconvincing (Finding No. 19),[3] and the great disparity of the award with evidence offered by the plaintiff's experts, reveals the court's complete acceptance on Neuner's testimony.

No issue exists between the parties as to the value of fixtures and equipment set by the court.

The United States Constitution (Fifth Amendment), as well as the State Constitution (art. 1, §14), requires "just compensation for property taken in the exercise of the power of eminent domain." Fair market value is accepted as "just compensation" (*United States v. Commodities Trading Corporation*, 339 U.S. 121 [70 S.Ct. 547]; *People ex rel. Dept. of Public Works v. City of Fresno*, 210 Cal. App. 2d 500, 515-516). The definition of fair market value has been a matter more for the courts than the Legislature (*County of Los Angeles v. Ortiz*, 6 Cal. 3d 141, 145), but the Evidence Code does codify the standards and methods of determining just compensation (Evid. Code §810 et seq.).[4] The Code provides, however, those standards are not intended to alter or change existing substantive law (Evid. Code §812).

FOOTNOTE 2: "18. The value of sand in place is fixed by capitalizing the net income from its extraction and sale."

FOOTNOTE 3: "19. The testimony of Keith W. Brownell as to the residual land value after the extraction of the sand is unconvincing."

FOOTNOTE 4: Of particular relevance here is Evidence Code section 819, which provides: "When relevant to the determination of the value of property, *a witness may take into account* as a basis for his opinion *the capitalized value of the reasonable net rental value* attributable to the land and existing improvements thereon (as distinguished from the capitalized value of the income or profits attributable to the business conducted thereon)." (Emphasis added.)

The California courts have determined fair market value should be the highest price estimated that the property would bring if it were exposed for sale in the open market for a reasonable period of time, and if the buyer had knowledge of all uses and purposes to which it is adaptable (*Sacramento etc. R.R. Co. v. Heilbron*, 156 Cal. 408, 409). This, of course, justifies the introduction of evidence relative to the availability of this property for various uses. Evidence of the economic feasibility of underwater mining, for example, to show the use to which the property may be put is properly admissible (*People ex rel. Dept. Pub. Wks. v. Flintkote Co.*, 264 Cal. App. 2d 97, 102). The evidence of highest and best use, however, must be distinguished from value from a particular use.[5] In *Sacramento etc. R.R. Co. v. Heilbron, supra*, 156 Cal. 408, 412, the court said:

> "[T]he test [of market value] is not the value for a special purpose, but the fair market value of the land in view of all the purposes to which it is naturally adapted; that therefore while evidence that it is 'valuable' for this or that or another purpose may always be given and should be freely received, the value in terms of money, the price, which one or another witness may think the land would bring for this or that or the other specific purpose is not admissible as an element in determining that market value. For such evidence opens wide the door to unlimited vagaries and speculations concerning problematical prices which might under possible contingencies be paid for the land. . . ."

FOOTNOTE 5: The case of *State of Cal. ex rel. State Pub. Wks. Bd. v. Wherity*, 275 Cal. App. 2d 241, relied on by Morrison, draws attention to this distinction (at p. 250), justifying the testimony of the "economist" on "***highest and best use when separated from a consideration of the market value of the property itself.***" (Emphasis added.)

This rule has been followed consistently since that time (*City of Los Angeles v. Retlaw Enterprises, Inc.*, 16 Cal. 3d 473, 488-489; *Long Beach City H. S. Dist. v. Stewart*, 30 Cal. 2d 763, 771; *Oakland v. Pacific Coast Lumber etc. Co.*, 171 Cal. 392, 399-400; *Laguna Salada etc. Dist. v. Pac. Dev. Co.*, 119 Cal. App. 2d 470, 476; *East Bay Mun. Utility Dist. v. Kieffer*, 99 Cal. App. 240, 250-251 (overruled on another point in *County of San Diego v. Miller*, 13 Cal. 3d 684, 693); *City of Stockton v. Vote*, 76 Cal. App. 369, 402-403).

In *People ex rel. State Park Com. v. Johnson*, 203 Cal. App. 2d 712, defendant's witness, an architect and planning consultant, did a feasibility study of the property with schematic diagrams for the sole purpose of showing that the land could be physically and economically adapted to his envisioned project which was a resort hotel with swimming pool, restaurant and lounge bar. The court first sustained objections to giving any future income figures because of the speculation involved but then asked the witness over plaintiff's objection what a purchaser would pay for property consistent with his plan. The witness then testified as to the figure he felt a buyer would expect to pay and still make "economic ends meet." The reviewing court held while testimony regarding the adaptability of land for that purpose was proper, it was error to admit evidence concerning the specific dollar value of the land for a specific project.

The same result was reached in *People ex rel. Dept. Pub. Wks. v. Silveira*, 236 Cal. App. 2d 604, 627, where the court held it was proper for a jury to consider evidence of economic analysis of adaptability of the property to a commercial and residential development to determine its highest and best use, but held it would be error to admit evidence to support a market value in terms of money which the land would bring for a specific purpose or as a result of a projected specific plan of development.

This rule proscribing evidence of the value of special uses in determining market value has been specifically applied in federal cases involving minerals (*United States v. 13.40 Acres of Land in*

City of Richmond, 56 F.Supp. 535, 538, 539). In *County of Los Angeles v. Beverley*, 126 Cal. App. 2d 89, 93, testimony of possible oil deposits having a speculative value of $5,500 was found to be improperly admitted but the case is undoubtedly distinguishable in that the testimony did not actually establish the presence of minerals but assigned the value for the "possibility" of oil being found. The court did, however, restate the general rule we have stated citing *Sacramento etc. R.R. Co. v. Heilbron, supra*, 156 Cal. 408.

The rule has been recognized and repeated by leading text writers (4 Nichols on Eminent Domain (3d ed.), §13.22[2], p. 133; I Orgel, Valuation Under Eminent Domain (2d ed.), §165, pp. 673-674 [relying in part on *City of Los Angeles v. Deacon*, 119 Cal. app. 491, 494-497]; Palmer's Manual of Condemnation Law, §86, at p. 242; and is the subject of 156 A.L.R. 1416, at p. 1423 et seq.; 27 Am. Jur. 2d, §290, at p. 91 et seq.; and 29A C.J.S., §174, at p. 735 et seq.). We are unable to find authority suggesting a departure from the long line of cases in this area.

While Neuner said the value of the land was inseparable from the minerals located in it, he placed a value on the land based only on the economic analysis of the market value of extracted sand. His value was, strictly speaking, a simple computation of number of tons of material available multiplied by the average price per ton for material of that general quality and subtracting the cost of the extraction which a hypothetical business operating on the premises might expect to incur. Such a business presents highly speculative cost and market determinations. It follows Neuner used an improper method to ascertain projected income and thus to establish a fair market value on the land. Accounting procedures of the business, flood control programs around the pits, fluctuations in property tax rates or tax assessed value, long-range projection of market demand for the product, inflation of production costs, government's attitude toward growth and its effect on construction programs, etc., present factors not possible to estimate or build into the analysis. Such calculations based on

such speculative factors are uniformly rejected by courts and must be rejected here.

Neuner's testimony is properly admissible to attest the highest and best use but it was error to allow admission of dollar value of sales in the course of the hypothetical business to establish fair market value. Morrison's only other expert, a real estate appraiser, admitted reliance on Neuner's analysis in determining the interim value of the property and the court's reliance on Neuner's testimony is apparent from the findings of fact. This testimony of value was clearly prejudicial.

Judgment reversed.

Acting P.J.

WE CONCUR:

J.

J.*

I IRVIN I. TUSZYNSKI, Clerk of the Court of Appeal, Fourth Appellate District, State of California, do hereby certify that the preceding and annexed is a true and correct copy of Opinion as shown by the records of my office.

WITNESS my hand and the Seal of the Court this 14th day of February A.D. 19 77

IRVIN I. TUSZYNSKI, Clerk

By _____ Deputy Clerk

*Retired Associate Justice of the Court of Appeal sitting under assignment by the Chairman of the Judicial Council.

BEST AVAILABLE COPY

APPENDIX 4

COURT OF APPEAL—STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION ONE

COURT OF APPEAL - FOURTH DIST.
FILED
DEC 24
ROBERT L. FORD, Clerk
DEPUTY CLERK

L.E. MORRISON,
Petitioner,
vs.
SUPERIOR COURT ETC.,
COUNTY OF SAN DIEGO,
Respondent,
COUNTY OF SAN DIEGO,
Real Party in Interest.

4 Civil No. 24342

SUPERIOR COURT NO. 339813

FILED
Robert D. Zumbrun, Clerk
DEC 26 1980
DEPUTY

THE COURT:

The petition for writ of mandate to stay petitioner's displacement from his property pending a determination of available relocation assistance and benefits, is denied.

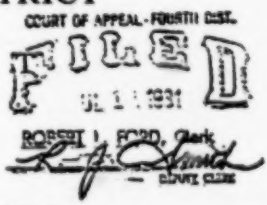
Acting Presiding Justice

APPENDIX 5

COURT OF APPEAL—STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

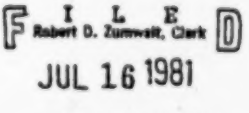
DIVISION ONE



COUNTY OF SAN DIEGO,
Petitioner,
vs.
SUPERIOR COURT ETC.,
COUNTY OF SAN DIEGO,
Respondent,
E. MORRISON, ET AL,
Real Parties in Interest.

4 Civil No. 24948

SUPERIOR COURT NO. 339813



THE COURT:

Partially because of the petition's failure to pray for a peremptory writ which this court could expeditiously have issued, and because the petition asks instead for an alternative writ the effect of which will consume much time and cost, we decline to exercise our discretion in correcting the superior court's obvious error in allowing the amendment to include goodwill. We defer our jurisdiction to the appeal, should there be one. The petition for writ of mandate and/or prohibition is denied.

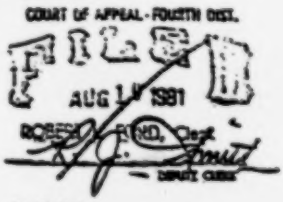
Brown
Presiding Justice

APPENDIX 6

COURT OF APPEAL—STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

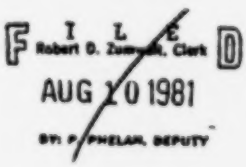
DIVISION ONE



COUNTY OF SAN DIEGO,
Petitioner,
vs.
SUPERIOR COURT ETC.,
COUNTY OF SAN DIEGO,
Respondent,
L. E. MORRISON, ET AL,
Real Parties in Interest.

4 Civil No. 26026

SUPERIOR COURT NO. 339813



THE COURT:

The petition for writ of mandate and/or prohibition is denied without prejudice.

Brown

Presiding Justice